

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

GAYLE STIPE,	:	APPEAL NO. C-080544
	:	TRIAL NO. DR-0401837
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
R. CASEY BARACH,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Defendant-appellant R. Casey Barach contests the trial court's entry of partial summary judgment in favor of plaintiff-appellee Gayle Stipe in her divorce action. For the following reasons, we affirm.

Barach and Stipe were married in 1995. They had no children born of this marriage. Stipe filed for divorce in August 2004 after learning that Barach was having an extramarital affair. During their nine-year marriage, Stipe and Barach contributed to and paid all expenses from joint accounts. In 2004, Barach earned a salary of \$125,000, and Stipe earned a base salary of \$85,000, plus sales commissions. Since 2001, Stipe had worked as a sales representative for Sungard Higher Education Inc., formerly known as Systems and Computer Technology

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Corporation (“SCT”), selling software systems to colleges and universities. This involved some travel, but all travel expenses and her home-office expenses were reimbursed by SCT. From January 2004 through March 2005, Stipe earned over \$300,000 in sales commissions.

For the division of the marital property, a hearing was held before a magistrate to determine the de facto termination date of the marriage. The magistrate found that the de facto termination date of the marriage was June 2, 2004, as this was when the parties began to disentangle themselves financially and Barach stopped living at the marital home. The trial court affirmed this ruling.

Stipe then moved for partial summary judgment, asking the trial court to determine that Barach was not entitled to any portion of the sales commissions she had “acquired” after June 2, 2004, even though some of the work generating the commissions had occurred during the marriage. In support of her motion, she submitted the affidavit of Candace A. Brooks, the Senior Financial Analyst for SCT. Attached to Brooks’s affidavit was a copy of the commission agreement between SCT and Stipe, which detailed how and when a commission was earned and when it was paid. The agreement stated that any commissions for software or service agreements sold would be paid “subject to [SCT]’s receipt of a License [or Service] agreement at its Malvern, Pennsylvania corporate headquarters \* \* \*.” Furthermore, the agreement indicated that commissions would be paid “30 days following the date [SCT] receives fully executed, original copies of the Licenses Agreement/Services agreement for which the Commissions are payable.” Finally, a sales representative had to be employed by SCT on the date that a commission was paid. Stipe argued

that since all the commissions at issue were based on contracts executed after June 2, 2004, those commissions were her separate property.

The magistrate denied Stipe's motion, relying on *Metz v. Metz*,<sup>2</sup> where this court held that even though the de facto termination date of a marriage was July 30, 2003, the trial court had not abused its discretion in "treating all of the contingency fees earned by the husband in his law practice in 2002 and 2003 as marital property, where the fees were the result of work that the husband had performed during the marriage."<sup>3</sup> Based on *Metz*, the magistrate determined that there were disputed issues of fact regarding whether the commissions earned by Stipe were the result of work that she had performed during the marriage.

Stipe filed objections to the magistrate's decision. The trial court sustained the objections, distinguishing the contingency fees at issue in *Metz* from the commissions at issue here, and found that there were no genuine issues of material fact. Ultimately, a decree of divorce was entered, incorporating a settlement agreement. The issue whether Barach was entitled to a portion of the commissions Stipe had earned and was paid after June 2, 2004, was to be determined following the outcome of this appeal.

From the entry of the decree of divorce, Barach brings forth two assignments of error. We address both assignments of error together, as they both essentially argue that the trial court erred in granting partial summary judgment in favor of Stipe. Specifically, Barach maintains that *Metz* was applicable to the facts in this case and that the entry of summary judgment was inequitable. We disagree.

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<sup>2</sup> 1<sup>st</sup> Dist. No. C-050463, 2007-Ohio-549.

<sup>3</sup> Id.

In *Metz*, although the de facto termination date of the marriage was July 30, 2003, we upheld the trial court's finding that all of the husband's contingent fees paid to him after the de facto termination date were marital property, because he had earned and was entitled to those fees during the marriage. In holding that the trial court had not abused its discretion in considering the contingent fees earned prior to, but paid after, the de facto termination date as marital property, we noted that the trial court had relied on the fact that the wife had "made a significant contribution to the marriage by staying at home and caring for the parties' children, thus allowing [the husband] to devote long hours to his law practice and to reach the income level he then enjoyed \* \* \*. [Furthermore,] to permit the husband to claim all the fees earned since the separation would have disregarded the wife's efforts during the marriage and the particular nature of the husband's employment."

The facts in the case before us are distinguishable from *Metz*. First, the nature of Stipe's employment was different from the husband's employment in *Metz* because sales commissions are not analogous to fees an attorney may earn due to a contingent-fee contract. The entitlement to a contingent fee is fixed at the beginning of the attorney/client relationship when the client executes the contingent-fee agreement. Thus, the husband in *Metz* had a right to the contingent fees at issue during the marriage, even though they were not paid until after the de facto termination date of the marriage. But here Stipe was not entitled to a commission merely because she began working with a client in an effort to make a sale during her marriage to Barach. Instead, she was only entitled to a commission when her client had executed a license or service agreement and that agreement had been delivered to her company. Thus, Stipe did not receive the right to the commissions in dispute

until there was an executed contract, which in this case was after the de facto termination date of the marriage.

Second, unlike the circumstances in *Metz* where the husband was not compensated for his time invested in a case prior to a judgment or settlement, Stipe was compensated simultaneously for her sales efforts by a significant base salary. Barach, unlike the wife in *Metz*, had the benefit and use of this salary during the marriage. Furthermore, there is nothing in the record to demonstrate that Barach put forth some type of significant effort that allowed Stipe to perform her sales job, while in *Metz* the wife stayed at home and cared for the parties' children to allow her husband to put in long hours at work.

Therefore, given that it was undisputed that Stipe's entitlement to the sales commissions did not vest until a license or service agreement was executed and that the commissions at issue were all based on contracts executed after June 2, 2004, we hold that the trial court did not err by holding that these commissions were her separate property and by granting partial summary judgment in favor of Stipe.<sup>4</sup>

Additionally, we are not persuaded that the trial court's judgment was "inequitable." Barach appears to argue that the de facto termination date used by the court caused an inequitable result with respect to the division of property. But the record does not demonstrate any such inequity. Barach points to the fact that Stipe had charged her business expenses to the couple's joint credit cards. She did. But her employer reimbursed her for those expenses. Barach points out that Stipe's children from a previous marriage lived with them and that the couple shared in

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<sup>4</sup> See R.C. 3105.171(A)(3)(a); see, also, *Wells v. Wells* (Dec. 30, 1999), 2<sup>nd</sup> Dist. No. 99-CA-0010 (holding that although the wife performed some labor during the marriage that led to a sales commission she earned after the de facto termination date of the marriage, that commission was her separate property).

those related expenses. They did, but the couple also shared the costs of Barach's child-support payments for a child from a previous marriage. Accordingly, because our review of the record does not reveal that the trial court abused its discretion and created an inequitable result by choosing June 2, 2004, as the de facto termination date of the marriage, we hold that the trial court's entry of partial summary judgment was proper.

The first and second assignments of error are overruled, and the judgment of the trial court is affirmed.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HILDEBRANDT, P.J and SUNDERMANN, JJ.**

**PAINTER, J.,** dissenting.

The magistrate was correct in denying summary judgment. There were facts in dispute. The court should have held an evidentiary hearing to determine what percentage, if any, of the commissions were earned before the marriage terminated. If substantial work were done that culminated in a payment, Barach would be entitled to a percentage. I would not distinguish Metz in such a technical manner—the majority draws irrelevant distinctions.

*To the Clerk:*

Enter upon the Journal of the Court on April 29, 2009  
per order of the Court \_\_\_\_\_.  
Presiding Judge